

MAY 5 3 24 PM '00 Federal Communications Commission

FCC 00-153

DISPATCHED BY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Mt. Juliet and Belle Meade,
Tennessee)

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MM Docket No. 97-97
RM-9047

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: April 20, 2000

Released: May 4, 2000

By the Commission:

1. The Commission has before it an Application for Review filed by The Cromwell Group, Inc. ("Cromwell Group") directed to the Memorandum Opinion and Order in this proceeding, 12 FCC Rcd 17616 (MMB 1997). Mt. Juliet Broadcasting, Inc. ("MJB") filed an Opposition to Application for Review and Cromwell Group filed a Reply to that Opposition. For the reasons discussed below, we deny the Application for Review.

Background

2. MJB, permittee of Station WNPL, Channel 294A, Mt. Juliet, Tennessee, commenced the operation of Station WNPL in 1996. As a result of a complaint of electromagnetic interference (EMI) to air navigation, MJB voluntarily terminated operation on November 7, 1996. Specifically, it was later determined that an operation on Channel 294A in the Mt. Juliet area would cause EMI to four Nashville area FAA localizers. Thereafter, on February 11, 1997, MJB filed a Petition for Rule Making proposing the reallocation of Channel 294A from Mt. Juliet to Belle Meade, Tennessee. This Petition was filed pursuant to Section 1.420(i) of the Rules which permits the modification of an authorization to specify a new community of license without affording other interested parties to file a competing expression of interest where the new community is mutually exclusive with the existing one. See Modification of FM and TV Authorizations to Specify a New Community of License ("Community of License"), 4 FCC Rcd 4870 (1989); recon granted in part, 5 FCC Rcd 7094 (1990). In considering such a reallocation proposal, we compare the existing allotment versus the proposed allotment to determine whether the reallocation will result in a preferential arrangement of allotments. This determination is based upon the FM allotment priorities set forth in Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982)¹. In making this evaluation, we consider the "totality of factors." LaGrange and Rollingwood, Texas, 10 FCC Rcd 3337 (1995).

3. In the Report and Order in this proceeding, the Bureau reallocated Channel 294A from Mt. Juliet to Belle Meade, Tennessee, and modified the Station WNPL construction permit to specify Belle Meade as

¹ The FM allotment priorities are as follows: 1) First full-time aural service; 2) Second full-time aural service; 3) First local service; and 4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3).

the community of license. 12 FCC Rcd 10481 (MMB 1997). That action was premised on the fact that a Channel 294A allotment could not be implemented at Mt. Juliet due to EMI to FAA air navigation facilities. In its engineering review, our staff concurred with the engineering exhibits submitted by MJB stating that there is no area in which a transmitter for Mt. Juliet could be located which would satisfy the FAA concerns regarding EMI to air navigation and enable Station WNPL to provide 70 dBu service to Mt. Juliet as required by Section 73.315(a) of the Rules. The staff also determined that there were no other FM channels available to Mt. Juliet. As such, the staff concluded that under these circumstances, a Channel 294A allotment at Belle Meade would be preferable to the existing allotment at Mt. Juliet. In the Memorandum Opinion and Order in this proceeding, the staff denied the Cromwell Group Petition for Reconsideration directed against that action.

4. In its Application for Review, Cromwell Group does not dispute the staff determination that Channel 294A cannot be implemented at Mt. Juliet. Instead, it contends that a reallocation of a defective Channel 294A allotment to Belle Meade is inconsistent with "controlling and dispositive authority" in which defective allotments have been deleted. These actions deleting an existing allotment are San Clemente, California, 10 FCC Rcd 8291 (1995); Harkers Island, North Carolina, 10 FCC Rcd 13159 (1995); Atlantic City, New Jersey, 57 RR2d 1436 (1985); and Pinckneyville, Illinois, 41 RR2d 69 (1977). In regard to these actions, Cromwell Group disputes the earlier staff determination that these cases are distinguishable because they did not involve an outstanding construction permit. Furthermore, Cromwell Group notes that MJB acquired the Channel 294A construction permit with full knowledge that a Channel 294A operation at Mt. Juliet could create a hazard to air navigation. In this regard, Cromwell Group refers to an April 22, 1991 adverse determination by the FAA and the fact that MJB offered to accept a modification of its construction permit with the following condition:

Upon receipt of notification from the Federal Communications Commission that harmful interference is being caused by the operation of the licensee's [permittee's] transmitter, licensee [permittee] shall either immediately reduce the power to the point of no interference, cease operations, or take such immediate corrective action as necessary to eliminate the harmful interference.

As such, Cromwell Group concludes that deletion of this allotment would be both consistent with prior Commission actions and in accordance with the condition on the modification of the Station WNPL construction permit actually proposed by MJB.

5. Cromwell Group also claims that it is not in the public interest to permit potential applicants to propose defective allotments in order that the subsequent construction permit for the allotment may be modified to a more desirable community of license. According to Cromwell Group, this will lead to "connivance and trickery" in the allotment process which is not in the public interest.

Discussion

6. We deny the Application for Review. Under Community of License, it is our view that in addition to the fact that this reallocation will result in a first local service to Belle Meade, a Channel 294A allotment at Belle Meade is preferable to the existing allotment at Mt. Juliet which cannot provide service to the public. It is also our view that the action reallocating Channel 294A to Belle Meade does not conflict with the actions cited by Cromwell Group in which defective allotments were deleted. As discussed below, those actions are distinguishable and following those actions in this proceeding would not be in the public interest. Unlike the current proceeding, none of those actions deleting a defective allotment involved an

outstanding construction permit. In fact, in all but one case, it was specifically determined that a construction permit could not be granted for the allotment and, as such, service could never be provided. In this instance, MJB constructed the authorized Station WNPL facilities and commenced operation. While MJB knew there was a risk that its Mt. Juliet facilities might cause unacceptable interference to FAA stations, this was not a certainty to the point of rendering the allotment defective ab initio. Rather, MJB accepted the risk, built the facilities and then determined that its operation was causing interference to FAA air navigation stations. Thereafter, MJB terminated operation in the interest of air safety. We do not see any public interest benefit in deleting the MJB construction permit in view of the fact that Station WNPL can now provide a first local service to Belle Meade, Tennessee, consistent with FAA air safety concerns. Moreover, in the cases cited by Cromwell Group, deletion of the allotment with the possible institution of other service resulting from the deletion was the only means to provide service to the public. In this proceeding, service could be provided on Channel 294A if we modified an outstanding construction permit to specify a new community of license at a new site. We continue to believe that this action will best serve the public interest because it will lead to a predictable and prompt institution of service.

7. We do not agree with any argument that permitting MJB to reallocate Channel 294A to Belle Meade would somehow condone "connivance and trickery" in our allotment process. First of all, there is nothing in the record of this proceeding or the earlier proceeding allotting the channel that would support an allegation that MJB or any other party deliberately proposed a defective allotment for Mt. Juliet. Similarly, there is no evidence nor is it reasonable to suggest that MJB knowingly went to the expense of constructing facilities that it knew would interfere with FAA navigation facilities so that it could subsequently seek reallocation. In regard to the underlying technical integrity of our allotment process, we are also of the view that our own engineering review of an allotment proposal coupled with the fact that each proposal is subject to public comment minimizes the likelihood of such future allotments regardless of any purported motive of a rulemaking proponent.

8. Finally, we reject the argument that the reallocation action in this proceeding was inconsistent with any condition on the MJB construction permit. In addition to the public interest benefits discussed above, we also believe that a reallocation of Channel 294A was, in fact, consistent with the specific language of the condition. Reallocating Channel 294A to a new community and at a new site that would not cause EMI is within the ambit of taking "such immediate corrective action as necessary to eliminate the harmful interference."

9. Accordingly, IT IS ORDERED, That the aforementioned Application for Review filed by The Cromwell Group, Inc. IS DENIED.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 418-2177.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script, reading "Magalie Roman Salas". The signature is written in dark ink and is positioned directly below the printed name of the Secretary.

Magalie Roman Salas
Secretary